SUPREME COURT, U.S.
SEP 23 1957
JOHN T. FEY, Clerk

No. 241

IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

In the Matter of
INLAND GAS CORPORATION,
Debtor,

In the Matter of
KENTUCKY FUEL GAS
CORPORATION,
Debtor,

In the Matter of
AMERICAN FUEL &
POWER COMPANY, et al.,
Debtors.

In Bankruptcy

REPLY OF ALLEN COMMITTEE AND EDWARD D. SPILMAN (AMERICAN FUEL STOCKHOLDERS) TO BRIEF OF COLUMBIA GAS SYSTEM, INC., IN OPPOSITION TO PETITION FOR CERTIORARI and MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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Sept. 19, 1957

NO.

241

Correction in Record

Columbia correctly points out that the Findings of Fact and Conclusions of Law of the District Court filed September 3, 1943 (1945 Rec. V.1, p. 590, et seq.), were subsequently corrected by order which withdrew and struck therefrom the last two sentences of paragraph 13 of the Findings of Fact. This order was overlooked by present counsel who was not connected with the case in 1943. We request that the Allen Appendix in the Certified Record be amended by striking therefrom the last two sentences of said paragraph 13 of the Findings of Fact. (Allen App., p. 10-A)

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I. REPLY TO COLUMBIA

A. Prior Decisions

Columbia's argument that the courts below have often decided issues raised in the Petition is not persuasive. It is, of course, true that the lower courts have repeatedly held on the facts then before them that Columbia's claims are subordinated to the claims of

the public creditors of Inland, American, and Kentucky. A careful reading of the earlier decisions, however, shows that the 1957 decision, review of which is sought, is the only one which has squarely considered questions presented in the Petition, i.e., the relative priority of Columbia's claims and the interests of American public stockholders.

The opinions in 1941, 1945 and 1951[1] considered only creditors' rights. The first 1954 decision[2] did consider American stockholders' rights on a petition by the American Trustee urging that after American public creditor claims were discharged from American's assets, the remaining assets should not be used to discharge claims of Kentucky public creditors, but should be applied to stock interest of American Stockholders, *including Columbia* which owns 76% of the American stock. The Court pointed out that the granting of the prayer of the petition would have permitted Columbia to participate in the debtor's assets, which "would be not only an anomaly but would fly in the face of the rationale of all prior adjudications" (211 F. 2d, p. 384) and denied the prayer of the petition.[3] This is certainly not an adjudication that Columbia's creditor rights are superior to the rights of public American stockholders.

The Court of Appeals directly stated in the second 1954 decision[4] that it had never previously passed on stockholders' rights. Its language is:

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[1]Reported respectively at 122 F. 2d 223, 151 F. 2d 461, and 187 F. 2d 813.

[2]*In re Inland Gas Corp.*, 211 F. 2d 381.

[3]American public stockholders were not represented in the District Court and could not appeal. The petition of the American Trustee did not permit classification of the rights of innocent public stockholders as different from the rights of Columbia as a result of which the Court gave little or no consideration to public stockholders' rights.

[4]*In re Inland Gas Corp.*, 217 F. 2d 207.

> "* * * Throughout our many opinions, it has been made clear that the subordination of the Columbia claims was for the benefit of the security-holders of American Fuel and Kentucky Fuel, and that until the debts to both were satisfied, *there was no occasion to consider any stockholder interest in either*[5] * * *." (217 F. 2d, p. 208)

This decision held only that the public stockholders of American were not entitled to an option to purchase stock in a proposed reorganized corporation. It did not hold that Columbia's claims are superior to the stock interest of the American public stockholders.

It is thus clear that the 1957 decision is the first in which the court below squarely passed on the interest of the American public stockholders. In that opinion the Court, perhaps preoccupied with an understandable desire to terminate 26 years of litigation, affirmed in all respects the judgment of the District Court. But even in this decision the Court considered stockholders' rights to be one of the "minor issues" (Opinion, Judge Simons, Petition, p. 31), and brushed it aside with minimum consideration, and without giving any real reason why the same equities which require injured creditors to be preferred over Columbia, do not require injured stockholders to be preferred.

If review is not granted and the decision below reversed, the important question of bankruptcy law raised by Point 1 of the "Questions Presented" in the Petition will remain unanswered by this Court and the way will be clear in the future for an anti-trust violator to force its competitor into bankruptcy and then use the Bankruptcy Court to recover money

[5]Emphasis supplied.

spent to accomplish the illegal act to the exclusion of stockholders of the debtors.

The S.E.C. urges review on this point.

B. Equitable Standing of Petitioners

Columbia suggests that since the stock represented by petitioners was issued as compensation for services,[6] petitioners have no equitable standing in this Court. This is an extraordinary argument. It was not improper in 1928 to issue stock for services, nor is it today.[7] On the other hand, Columbia, which denies petitioners' equitable standing in court, cannot and does not question the repeated holdings below that its claims and stock were acquired in the course of a conspiracy to restrain trade and competition in clear violation of law. The law-breaker's appeal to equity should not be heard.

II. REPLY TO S. E. C.

While S.E.C. supports review on the Columbia issue, it opposes review of the holding of the court below that Kentucky creditors are entitled to receive Inland assets which passed to American by reason of American's stock holdings in Inland. The reason assigned against review is:

> "* * * There has been no attempt to make a record indicating the relative equities as between

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[6]While Columbia states repeatedly in the Brief that the American stock was issued without consideration, the record clearly shows that this stock was acquired by the organizers and underwriters as compensation for services. See record reference at Footnote **, p. 3, Columbia Brief.

[7]It may be that today the issuing of all the stock for services is not in accordance with best corporate practice, but its issue, as Judge Simons wrote in considering certain gas leases made by Kentucky, should "be viewed in the light of the promotional climate of the times." (208 F. 2d, p. 16) No stock was offered to the general investing public. All stock purchasers, including Columbia, were fully informed of the circumstances of its issue.

> the public creditors of Kentucky Fuel and American Fuel's stockholders. * * *" (Note 20, p. 19, S.E.C. Memorandum)

We disagree with S.E.C. that the record does not show the relative equities as between public creditors of American Fuel and the American Fuel stockholders (see Petition, p. 18, et seq.), but if S.E.C. is right, the lack of record is sufficient reason for review of the opinion of the court below. As we pointed out in the Petition, it might be proper for the court below to provide for discharge of claims against Kentucky out of American assets if clear equitable reasons are shown. In the absence of such showing, or if we are right that the record affirmatively shows that Kentucky creditors have no equities against American, this Court should review the lower court's failure to follow the "absolute priority" rule in bankruptcy.

We note that the position of S.E.C. here is contrary to its position on the 1951 Appeal, when it urged that the stock interest of the public stockholders of Inland in Inland assets should be allowed as superior to the claims of the public creditors of American and Kentucky. (See 187 F. 2d, p. 817)

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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